

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

SAMUEL MENDEZ

Plaintiff,

v.

**PENNSYLVANIA DEPARTMENT
OF CORRECTIONS, et al.,**

Defendants.

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C.A. No. 05-35 Erie

MOTION TO DISMISS

AND NOW comes the defendant, the Pennsylvania Department of Corrections, by its attorney's, Thomas W. Corbett, Jr., Attorney General, Rodney M. Torbic, Senior Deputy Attorney General, and Susan J. Forney, Chief Deputy Attorney General, Chief, Litigation Section, and hereby moves to dismiss plaintiff's complaint pursuant to Fed.R.Civ.P. 12(b)(6) for the reasons that follow:

1. This is a civil action filed by Samuel Mendez, a prisoner incarcerated at the State Correctional Institution at Albion.

2. Mendez complains that two physicians at the prison did not provide him with adequate medical care for a shoulder injury that he sustained.

3. He contends that proper treatment was not rendered due to cost restrictions, and that this amounted to deliberate indifference to his medical needs in violation of the Eighth Amendment to the United States Constitution.

4. Mendez is seeking compensatory and punitive damages, and an order directing that he be sent to an outside specialist for an independent medical exam.

5. The complaint fails to state a claim upon which relief can be granted.
6. The Department of Corrections is not a proper party in a §1983 action.
7. The claims against the Department of Corrections are barred by the Eleventh Amendment.

WHEREFORE, it is respectfully requested that the defendant's motion to dismiss be granted.

Respectfully submitted,

THOMAS W. CORBETT, JR.
Attorney General

s/Rodney M. Torbic
Rodney M. Torbic
Senior Deputy Attorney General
Attorney I.D. No. 66089

Susan J. Forney
Chief Deputy Attorney General

Office of Attorney General
6th Floor, Manor Complex
564 Forbes Avenue
Pittsburgh, PA 15219

Date: October 7, 2005

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Motion to Dismiss was served upon the following via electronic mail on October 7, 2005.

Elizabeth M. Yanelli, Esquire
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via first-class mail:

Samuel Mendez, CY-7322
State Correctional Institution
at Albion
10745 Route 18
Albion, PA 16475-0004

s/Rodney M. Torbic
Rodney M. Torbic
Senior Deputy Attorney General

OFFICE OF ATTORNEY GENERAL
6th Floor, Manor Complex
564 Forbes Avenue
Pittsburgh, PA 15219

Date: October 7, 2005

